No. 21-10806

In the United States Court of Appeals for the Fifth Circuit

STATE OF TEXAS; STATE OF MISSOURI,
Plaintiffs-Appellees,

v.

JOSEPH R. BIDEN, JR., in his official capacity as President of the United States of America; UNITED STATES OF AMERICA; ALEJANDRO MAYORKAS, Secretary, United States Department of Homeland Security; UNITED STATES DEPARTMENT OF HOMELAND SECURITY; TROY MILLER, Acting Commissioner, United States Customs and Border Protection; UNITED STATES CUSTOMS AND BORDER PROTECTION; TAE D. JOHNSON, Acting Director, United States Immigration and Customs Enforcement; UNITED STATES IMMIGRATION AND CUSTOMS ENFORCEMENT; TRACY RENAUD, in her official capacity as Acting Director of the United States Citizenship and Immigration Services; UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES,
Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of Texas, Amarillo Division

BRIEF FOR APPELLEES

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Certificate of Interested Persons

No. 21-10806

State of Texas, State of Missouri,
Plaintiffs-Appellees,

v.

Joseph R. Biden, Jr., in his official capacity as President of the United States of America; United States of America; Alejandro Mayorkas, Secretary, United States Department of Homeland Security; United States Department of Homeland Security; Troy Miller, Acting Commissioner, United States Customs and Border Protection; United States Customs and Border Protection; Tae D. Johnson, Acting Director, United States Immigration and Customs Enforcement; United States Immigration and Customs Enforcement; Tracy Renaud, in her official capacity as Acting Director of the United States Citizenship and Immigration Services; United States Citizenship and Immigration Services,
Defendants-Appellants.

Under the fourth sentence of Fifth Circuit Rule 28.2.1, appellees, as governmental parties, need not furnish a certificate of interested persons.

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Statement Regarding Oral Argument

This Court has set oral argument in this matter for November 2, 2021 at 9:00 a.m. The States will participate in oral argument.

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INTRODUCTION

The Supreme Court has already concluded that Appellants "failed to show a likelihood of success on the claim that the memorandum rescinding the Migrant Protection Protocols was not arbitrary and capricious." *Biden v. Texas*, No. 21A21, 2021 WL 3732667, at *1 (U.S. Aug. 24, 2021). This Court, likewise, concluded that Appellants are unlikely to prevail on appeal in this case on *all* of the claims at issue. *Texas v. Biden*, 10 F.4th 538, 552, 557, 559 (5th Cir. 2021) (per curiam). Appellants brief mostly rehashes the same arguments that have already failed to persuade this Court and the Supreme Court.

Nothing in the Government's brief or the administrative record shows that, in terminating the Migrant Protection Protocols ("MPP"), the Secretary gave meaningful consideration to critical aspects of the problem. Quite the contrary, among other things, he disregarded (1) DHS's own prior finding that MPP was effective; (2) that MPP dramatically reduced DHS's systematic violation of its detention obligations under 8 U.S.C. § 1225; and (3) the States' manifest reliance interests in not having aliens unlawfully released within their borders.

Appellants emphasize that their authority to return illegal aliens to Mexico is discretionary under Section 1225, but they simply ignore that their obligation to detain aliens allowed to remain in the United States is not. Preventing Appellants from abdicating their statutory duties is not some absurd result; rather, it is requiring compliance with federal law. As the district court found, MPP's rescission caused the unlawful release of tens of thousands of aliens into the United States, notwithstanding Section 1225's directive that they "shall" be detained.

This Court and the district court got it right, as their well-reasoned findings and conclusions amply demonstrate. Appellants request reversal of a permanent injunction supported by a meticulous, 53-page opinion following a full trial on the merits. As explained in this Court's similarly thorough 34-page opinion,[1] the district court's decision rests on several "relevant" and "largely uncontested" findings of fact and conclusions of law set forth in painstaking detail. Most relevant here, the district court held that Appellants' termination of the effective Migrant Protection Protocols was arbitrary and capricious and further violated the Immigration and Nationality Act ("INA") in "the[ ] particular circumstances" of this case. *Texas*, 10 F.4th at 552 (citation omitted); *id.* at 544-45. Appellants have "not come close to showing that [they are] likely to succeed" on appeal. *Id.* at 552; *see also id.* at 557, 559.

Rightly so. The termination of MPP was unlawful in at least two key ways. *First*, it was arbitrary and capricious. Secretary Mayorkas could not terminate MPP while "fail[ing] to consider [its] main benefits," including "deterr[ing] aliens . . . from attempting to illegally cross the border." *Texas v. Biden*, 2021 WL 3603341, at *24 (N.D. Tex. Aug. 13, 2021). DHS even "ignor[ed] its own previous assessment" finding that MPP "demonstrated operational effectiveness." *Id.* at *5, *19. The Secretary also failed to consider the States' reliance interests or alternative policies within the ambit of MPP. *Second*, terminating MPP caused DHS to violate systematically the mandatory-detention provisions in Section 1225. Terminating MPP increased

[1] While not "binding," *Texas Democratic Party v. Abbott*, 978 F.3d 168, 176 (5th Cir. 2020), the motions panel's opinion is entitled to "some measure of deference." *Wallace v. FedEx Corp.*, 764 F.3d 571, 583 (6th Cir. 2014).

the number of aliens subject to mandatory detention, but DHS "admit[ted] it does not have the capacity to meet its detention obligations under Section 1225." *Id.* at *23. So, "[u]nder *these particular* circumstances, where Defendants cannot meet their detention obligations, terminating MPP necessarily leads to the systemic violation of Section 1225 as aliens are released into the United States because Defendants are unable to detain them." *Id.*

Appellants' arguments on the equitable factors fare no better. Appellants' own evidence contradicts claims that re-implementing MPP in good faith will interfere with foreign relations and cause chaos at the border. To the contrary, chaos at the border followed in the wake of MPP's termination; and Appellants' concern about "chaos" rings hollow in view of the border crisis that DHS's unlawful actions fomented. Appellants' alleged harms arise from their decision to violate federal law—and thus are of their own making. Such self-inflicted injuries "do not count." *Texas*, 10 F.4th at 558.

This Court should affirm the district court's judgment.

Statement of Jurisdiction

The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331, 1361, and 2201(a). This Court has jurisdiction to hear an appeal from the district court's final judgment pursuant to 28 U.S.C. § 1291, not § 1292(a)(1) as Appellants contend. *Accord Shanks v. City of Dallas*, 752 F.2d 1092, 1096-97 (5th Cir. 1985).

Issues Presented

1. Whether the district court correctly concluded that the States have standing to challenge the termination of MPP.
2. Whether the district court correctly concluded that the decision to terminate MPP is subject to judicial review.
3. Whether the decision to terminate MPP was arbitrary and capricious in violation of the APA.
4. Whether the decision to terminate MPP leads to systemic violations of 8 U.S.C.§ 1225.
5. Whether the district court correctly concluded that equitable factors support an injunction independent of vacatur of the June 1 Memorandum terminating MPP.

Statement of the Case

In 2018, an immigration surge caused a "humanitarian and border security crisis," with "severe impacts on U.S. border security and immigration operations." *Texas*, 2021 WL 3603341, at *4. Thousands of inadmissible aliens from Central America crossed the Southern border daily through Mexico and claimed asylum upon arrival. *Id.* Most of these claims were without merit, as "only 14 percent of aliens who claimed credible fear of persecution or torture were granted asylum between Fiscal Year 2008 and Fiscal Year 2019." *Id.*

The high volume of "fraudulent asylum claims" and "dramatic increase in illegal migration" made it "harder for the U.S. to devote appropriate resources to individuals who [were] legitimately fleeing persecution." *Id.* (alteration in original). This

influx "divert[ed] resources" from legitimate asylum seekers, and illegitimate ones were being released into the interior of the United States, where many disappeared before adjudication of their claims and "simply bec[a]me fugitives." *Id.* (second alteration in original). The influx of illegal aliens imposed non-recoverable costs on the States, including those associated with providing driver's licenses, public education, and healthcare—many of which costs are mandatory and unavoidable. *Id.* at *9-10. The influx also imposed a range of fiscal and humanitarian costs, from increased burdens on law enforcement to the victimization of migrants by human traffickers. *Id.*

In response, on December 20, 2018, the Trump Administration implemented MPP. *Texas*, 10 F.4th at 543. Relying on its authority under the INA, 8 U.S.C. § 1225(b)(2)(C), DHS began to return to Mexico tens of thousands of aliens who, though neither nationals nor citizens of Mexico, arrived to the United States from that country. The United States did so pursuant to federal law, which neither required foreign assistance nor contemplated foreign consent. Mexico subsequently accepted the re-entry of MPP enrollees back within its borders. *Id.* at 548-49, 559.

MPP was designed to ensure that "[c]ertain aliens attempting to enter the U.S. illegally or without documentation . . . will no longer be released into the country," only to "fail to file an asylum application and/or disappear before an immigration judge can determine the merits of any claim." *Id.* at 543. It proved successful: On October 28, 2019, DHS assessed MPP and found that it "demonstrated operational effectiveness" and "ha[d] been an indispensable tool in addressing the ongoing crisis at the southern border and restoring integrity to the immigration system." *Texas*, 2021 WL 3603341, at *5. DHS reported that it had "observed a connection between

MPP implementation and decreasing enforcement actions at the border—including a rapid and substantial decline in apprehensions in those areas where the most amenable aliens have been processed and returned to Mexico pursuant to MPP." *Id.*

DHS's investigation explained why. MPP "restor[ed] integrity to the immigration system" because "MPP returnees with meritorious claims [could] be granted relief or protection within months, rather than remaining in limbo for years while awaiting immigration court proceedings in the United States." *Id.* At the same time "MPP returnees who do not qualify for relief or protection [were] being quickly removed from the United States." *Id.* Thus, "aliens without meritorious claims—which no longer constitute a free ticket into the United States—[were] beginning to voluntarily return home." *Id.*; *see also Texas*, 10 F.4th at 544-45, 554. MPP removed the "perverse incentives" created by allowing "those with nonmeritorious claims . . . [to] remain in the country for lengthy periods of time." *Texas*, 2021 WL 3603341, at *18 (alterations in original).

On January 20, 2021, the Biden Administration indefinitely suspended further enrollments in MPP in a three-line memorandum. *Texas*, 2021 WL 3603341, at *1. Enforcement encounters on the southern border immediately skyrocketed, climbing from 75,000 in January, to 173,000 in April, and over 210,000 in July. *Id.* at *9 & n.7. This amplified the ongoing border crisis, emboldening criminal cartels and human traffickers who prey on vulnerable migrants. *Id.* at *10.

On April 13, 2021, Texas and Missouri challenged DHS's suspension of MPP, alleging that the suspension of the program violated the APA and the INA. *Texas*, 10 F.4th at 544. The States moved for a preliminary injunction, but before briefing was

concluded, DHS issued a new memorandum (the "June 1 Memorandum") that permanently terminated MPP. *Id.* The June 1 Memorandum failed to discuss any of the following: MPP's role in discouraging illegal border crossings; DHS's own favorable October 28, 2019 assessment of MPP; the States' reliance interests in maintaining MPP; the fact that MPP had allowed DHS to avoid violating its detention obligations under Section 1225 of the INA; or any alternatives within the ambit of the existing policy, short of terminating MPP. ROA.1684-90.

The States promptly amended their complaint to challenge the June 1 Memorandum. *Texas*, 2021 WL 3603341, at *1. The parties agreed to consolidate the preliminary injunction hearing with a trial on the merits pursuant to Federal Rule of Civil Procedure 65(a)(2). *Texas*, 10 F.4th at 544. After a bench trial, the district court concluded that the States "are entitled to relief on their APA and statutory claims against Defendants," and vacated the June 1 Memorandum. *Texas*, 2021 WL 3603341, at *1, *27-28. The district court also "craft[ed] injunctive relief to ensure Plaintiffs receive a full remedy" because, as the district court found, an injunction would have "meaningful practical effect independent of . . . vacatur." *Id.* at *1, *26-28 (quoting *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010)). The district court specifically ordered the Secretary and DHS "to enforce and implement MPP *in good faith* until such a time as it has been lawfully rescinded in compliance with the APA **and** until such a time as the federal government has sufficient detention capacity to detain all aliens subject to mandatory detention under Section 1225 without releasing any aliens *because of* a lack of detention resources." *Id.* at *27.

The Government immediately sought an emergency stay. *Texas*, 10 F.4th at 545. The district court granted Appellants seven days to seek emergency relief on appeal, *see Texas*, 2021 WL 3603341, at *28, but denied an additional stay. ROA.3025. A motions panel of this Court likewise denied a stay in a thirty-four page opinion, concluding that Appellants: (1) had "not come close to a 'strong showing' that [they are] likely to succeed on the merits"; (2) had "not shown that [they] will be irreparably injured absent a stay pending appeal"; and that (3) "[t]he final two *Nken* factors [did] not warrant a stay." *Texas*, 10 F.4th at 557, 559 (citing *Nken v. Holder*, 556 U.S. 418 (2009)).

Appellants nevertheless applied for an emergency stay pending appeal from the Supreme Court, which too denied a stay because Appellants had "failed to show a likelihood of success on the claim that the memorandum rescinding the Migrant Protection Protocols was not arbitrary and capricious." *Biden*, 2021 WL 3732667, at *1 (citing *Dep't of Homeland Security v. Regents of Univ. of Cal.*, 140 S. Ct. 1891, 1907, 1910-1915 (2020).

This appeal on the merits followed.

Summary of the Argument

The States have standing. Rescission of MPP caused them classic pocketbook injury through increased costs related to driver's licenses, education spending, healthcare spending, and crime. This Court has previously explained that increased costs related to driver's licenses in particular suffice to show standing on nearly identical evidence. *Texas v. United States*, 809 F.3d 134, 155 (5th Cir. 2015). These harms are fairly traceable to the rescission of MPP and redressed by the district court's

judgment. Were there any doubt, the States are entitled to special solicitude in the standing analysis. *Id.* at 155-56; *see also Massachusetts v. EPA*, 549 U.S. 497, 520 (2007).

None of Appellants' other various jurisdictional objections have merit. *First*, termination of MPP is not within the narrow range of cases where action is committed to agency discretion by law, and the mere presence of some discretion does not render decisions unreviewable. *Regents*, 140 S. Ct. at 1905-07. Even if the statute "leave[s] much to the Secretary's discretion," it "do[es] not leave his discretion unbounded." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2568 (2019). As this Court has already correctly held, numerous portions of the INA constrain the agency's discretion in various ways. *Texas*, 10 F.4th at 551.

Second, the States are within the INA's zone of interest. The "test . . . is not meant to be especially demanding and is applied in keeping with Congress's evident intent when enacting the APA to make agency action presumptively reviewable." *Texas*, 809 F.3d at 162 (citation and internal quotation marks omitted). Appellants' contention that the States are not within the zone of interest of the INA is refuted by this Court's precedent. *Id.* at 163 ("The interests the states seek to protect fall within the zone of interests of the INA.").

Third, rescission of MPP is final agency action. In order to be final, agency action first "must mark the consummation of the agency's decisionmaking process" *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1813 (2016) (quoting *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). "'Second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow.'"

Id. "'[W]here agency action withdraws an entity's previously-held discretion, that action alters the legal regime, binds the entity, and thus qualifies as final agency action' under the APA." *Texas*, 10 F.4th at 550 (quoting *Texas v. EEOC*, 933 F.3d 433, 442 (2019)). Rescission of MPP satisfies both prongs of this test because the June 1 Memorandum marked the consummation of the agency's decisionmaking process and withdrew discretion that DHS line officers previously had to remove individuals pursuant to MPP.

On the merits, rescission of MPP was arbitrary and capricious, as the Supreme Court has already concluded. *Biden*, 2021 WL 3732667, at *1. The June 1 Memorandum rescinding MPP, at a minimum: (1) failed to consider MPP's benefits, (2) reached arbitrary conclusions, (3) failed to consider the States' reliance interests, (4) failed to consider alternatives within the ambit of existing policy, and (5) failed to consider the effect of the rescission of MPP on Appellants' compliance with federal law. "[T]hese . . . omissions . . . doom the Government's appeal." *Texas*, 10 F.4th at 553. Under these circumstances, remand and vacatur was the appropriate remedy.

MPP's rescission likewise causes Appellants to violate systematically Section 1225. If an alien subject to expedited removal lacks credible fear of persecution, the alien can invoke further administrative proceedings but "shall be detained pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed." 8 U.S.C. § 1225(b)(1)(B)(iii)(IV). Even if the officer determines that the "alien has a credible fear of persecution . . . the alien shall be detained for further consideration of the application for asylum." *Id.* § 1225(b)(1)(B)(ii). Appellants may parole covered aliens for limited statutory purposes. But "[w]hat the

Government cannot do, the district court held, is simply release every alien described in § 1225 *en masse* into the United States." *Texas*, 10 F.4th at 558. "The Government has" still "not pointed to a single word anywhere in the INA that suggests it can do that." *Id.* "Under *these particular* circumstances, where Defendants cannot meet their detention obligations, terminating MPP necessarily leads to the systematic violation of Section 1225 as aliens are released into the United States because Defendants are unable to detain them." *Texas*, 2021 WL 3603341, at *23.

Finally, the equitable factors favor an injunction. Permanent injunctive relief is proper where the plaintiffs show (1) irreparable harm; (2) no adequate remedy at law; (3) the balance of hardships between the plaintiffs and defendants favors injunctive relief; and (4) the public interest would not be disserved by a permanent injunction. *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006).The States amply demonstrated that these factors are met. At trial, the States showed that (1) "they are suffering ongoing and future injuries as a result of the termination of MPP"; (2) they "are unable to recover the additional expenditures from the federal government"; and that (3) there is no public interest "in the perpetuation of unlawful agency action." *Texas*, 2021 WL 3603341, at *26 (cleaned up). There is a public interest, however, in having federal agencies abide by federal law, in "stemming the flow of illegal immigration," and in enforcing federal immigrations laws such as § 1225. *Id.* Appellants' contrary arguments are without merit.

STANDARD OF REVIEW

In reviewing the issuance of a permanent injunction, factual findings are reviewed for clear error, legal conclusions are reviewed de novo, and the ultimate decision to grant the injunction is reviewed for abuse of discretion. *Accord eBay Inc.*, 547 U.S. at 391; *Texas*, 10 F.4th at 546; *Fath v. Texas Dep't of Transp.*, 924 F.3d 132, 136 (5th Cir. 2018) (per curiam).

ARGUMENT

I. The District Court Correctly Concluded That the States Have Standing.

Standing requires "an injury that is 'concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.'" *Texas*, 809 F.3d at 150 (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410 (2013)). The States easily meet this standard.

The district court's findings of fact related to standing are reviewed for clear error. *Env't Tex. Citizen Lobby, Inc. v. ExxonMobil Corp.*, 968 F.3d 357, 367 (5th Cir. 2020) ("Because this case was tried, Plaintiffs needed to prove standing by a preponderance of the evidence. A factual finding that a plaintiff met that burden is reviewed for clear error.") (internal citation omitted). "If the district court's view of the evidence is plausible in light of the entire record, an appellate court may not reverse even if it is convinced that it would have weighed the evidence differently in the first instance." *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2349 (2021).

As this Court has already recognized, the district court found "eight facts central to the standing issue" that were essentially "uncontested," including: (1)

"'aliens present in Texas because of MPP's termination would apply for driver's licenses,'" *Texas*, 10 F.4th at 546-47; (2) "'[s]ome school-age child aliens who would have otherwise been enrolled in MPP are being released or paroled into the United States,'" *id.* at 547; (3) "[s]ome aliens who would otherwise have been enrolled in MPP . . . will use state-funded healthcare services or benefits," *id.*, and (4) yet others will "commit crimes in Texas." *Id.* Each of these harms to the States is an independent basis of standing.

A. The district court correctly concluded that the States have suffered injury in fact.

The district court's findings show the States have injury in fact. As this Court has made clear, the costs associated with providing driver's licenses to aliens is sufficient to satisfy the injury in fact requirement for standing. *Texas*, 809 F.3d at 155-56.[2] And as the district court here found, "[a]s a result of the termination of the MPP, some aliens who would have otherwise been enrolled in MPP are being released or paroled into the United States and will obtain Texas driver's licenses." *Texas*, 2021 WL 3603341, at *9.

Quoting this Court's precedent, the district court found that "[b]ecause 'driving is a practical necessity in most of' Texas, 'there is little doubt that many' aliens present in Texas because of MPP's termination would apply for driver's licenses."

[2] This Court's opinion in the DAPA case compels the conclusion that Plaintiffs have standing here because the relevant evidence in the two cases is essentially indistinguishable. *Compare* 809 F.3d at 155-56, *and Texas v. United States*, 86 F. Supp. 3d 591, 616-17 (S.D. Tex. 2015), *with Texas*, 2021 WL 3603341, at *9-10, *and* ROA.1586-90.

Id. at *10 (quoting *Texas*, 809 F.3d at 156). And because "licenses issued to beneficiaries would necessarily be at a financial loss," *Texas*, 809 F.3d at 155, the States suffered injury in fact in the DAPA case. This is "the predictable effect of Government action on the decisions" made by Appellants. *Dep't of Com.*, 139 S. Ct. at 2566.

As the district court found—and the record shows—precisely so here. Under Texas law, the officials responsible for issuing drivers licenses to individuals will issue a Texas driver's license "[i]f an individual presents documentation issued by the federal government showing authorization to be in the United States . . . and otherwise meets eligibility requirements." ROA.1587. They lack the discretion to deny a license based on, for example, the length of an individual's authorized presence in the United States. ROA.1587-88. For each 10,000 additional licenses, Texas incurs costs of approximately $2 million. ROA.1588-89. Missouri faces similar costs verifying the lawful immigration status of additional customers seeking a Missouri driver's license. *Texas*, 2021 WL 3603341, at *10. So individuals who merely seek to obtain driver's licenses increase costs to the States. *Id.* at 9 ("Each additional customer seeking a Texas driver's license imposes a cost on Texas."); *see also* ROA.1588.

Precisely the same logic applies to costs related to providing a free and public education, providing healthcare services or benefits, and combatting crime. *Texas*, 10 F.4th at 546-47. The district court found that "[s]ome school-age child aliens who would have otherwise been enrolled in MPP are being released or paroled into the United States" and "[t]he total costs to Texas (and Missouri) of providing public education for illegal alien children will rise in the future as the number of illegal alien

children present in the State increases."[3] *Texas*, 2021 WL 3603341, at *10. The district court also found that "[s]ome aliens who would otherwise have been enrolled in MPP are being released or paroled into the United States and will use state-funded healthcare services or benefits in Texas or Missouri." *Id.* And the district court concluded that "[s]ome aliens who would have otherwise been enrolled in MPP are being released or paroled into the United States and will commit crimes in Texas and Missouri." *Id.*

Each of these expenses constitutes classic pocketbook injury in the same way that costs associated with issuing driver's licenses constitutes pocketbook injury. They provide "equally strong bases for finding cognizable, imminent injury." *Texas*, 10 F.4th at 548.

B. The district court correctly concluded that the States' injury is actual and imminent and fairly traceable to termination of MPP.

The States' harms are actual and imminent and fairly traceable to the termination of MPP because, as the district court found, "termination of MPP necessarily increases the number of aliens present in the United States regardless of whether it increases the absolute number of would-be immigrants." *Texas*, 2021 WL 3603341, at *8. This is true because "[w]ithout MPP, Defendants are forced to release and parole aliens into the United States because Defendants simply do not have the

[3] The Constitution prohibits the States from "deny[ing] to undocumented school-age children the free public education that it provides to children who are citizens of the United States or legally admitted aliens." *Plyler v. Doe*, 457 U.S. 202, 205, 230 (1982).

resources to detain aliens as mandated by statute." *Id.* Even if that were not true, the district court also found that "the termination of MPP has contributed to the current border surge." *Id.* at *9.

Because rescission of MPP increases the number of aliens admitted into the States, "the States have incurred and will continue to incur costs associated with the border crisis" and "at least part of which the district court found is traceable to rescinding MPP[.]" *Texas*, 10 F.4th at 548. "The causal chain is easy to see." *Id.*; *see also Massachusetts*, 549 U.S. at 523 (traceability present where EPA's challenged action might cause individuals to drive less fuel-efficient cars, which in turn may contribute to a rise in sea levels, which may then cause erosion of coastline).

It is not "mere speculation" that at least some individuals who otherwise would have been obliged to remain in Mexico because of MPP both have and will come to the States and seek a driver's license, medical care, or some other benefit. *Dep't of Com.*, 139 S. Ct. at 2566. Rather it is the "predictable effect of government action on the decisions of third parties." *Id.*

C. The district court correctly concluded that the States' injury is redressable.

The district court concluded that it had the "power to redress" the States' injuries because "[t]he APA allows the Court to 'set aside agency action . . . [that is] arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.'" *Texas*, 2021 WL 3603341, at *12. It further concluded that "injunctive relief authorizing DHS officers to return aliens to Mexico via the MPP program pending

resolution of their asylum claims would decrease the number of aliens paroled and released into the United States and into the Plaintiff States specifically." *Id* .

As this Court explained it, "[a]n injunction would remedy [the States'] injury by requiring reinstatement of MPP. And with MPP back in place, immigration officers would once again have discretion to return (some) aliens to Mexico." *Texas*, 10 F.4th at 548.

It is no answer that not every alien eligible for MPP will be returned to Mexico. "When 'establishing redressability, [a plaintiff] need only show that a favorable ruling could potentially lessen its injury; it need not definitively demonstrate that a victory would completely remedy the harm.'" *Sanchez v. R.G.L.*, 761 F.3d 495, 506 (5th Cir. 2014) (quoting *Antilles Cement Corp. v. Fortuno*, 670 F.3d 310, 318 (1st Cir.2012)). The district court's judgment redresses the States' injuries.

D. The States are entitled to special solicitude in this Court's standing analysis.

As the district court and this Court have already concluded, "[t]o eliminate any doubt as to standing, we emphasize that the States are entitled to 'special solicitude' in the standing analysis." *Texas*, 10 F.4th at 549 (quoting *Massachusetts*, 549 U.S. at 520); *Texas*, 2021 WL 3603341, at *13 (quoting *Massachusetts*, 549 U.S. at 518). To be entitled to special solicitude, "(1) the State must have a procedural right to challenge the action in question, and (2) the challenged action must affect one of the State's quasi-sovereign interests." *Texas*, 10 F.4th at 549 (citing *Texas*, 809 F.3d at 151-52).

Both factors are present here. First, just like in the DAPA case, "Texas is asserting a procedural right under the APA to challenge agency action." *Id.* (citing *Texas*, 809 F.3d at 152). This procedural right is sufficient. As the Supreme Court explained in *Massachusetts v. EPA*, "Congress has . . . recognized a . . . procedural right to challenge" agency action that is "arbitrary and capricious." 549 U.S. at 520. "Given that procedural right and Massachusetts' stake in protecting its quasi-sovereign interests, the Commonwealth is entitled to special solicitude in our standing analysis." *Id.* Thus, the Supreme Court has made clear that challenging an agency action as arbitrary and capricious can give rise to the relevant procedural right.

Second, the States have a quasi-sovereign interest because the States' "challenge involve[s] an agency's alleged failure to protect certain formerly 'sovereign prerogatives [that] are now lodged in the Federal Government.'" *Texas*, 809 F.3d at 152 (quoting *Massachusetts*, 549 U.S. at 520). The States here, like Massachusetts, "have surrendere[d] certain sovereign prerogatives" and "cannot invade" or "negotiate [a] treaty" to address the problems created by MPP's rescission. *Massachusetts*, 549 U.S.at 519.

E. Appellants' counterarguments lack merit.

Appellants raise several objections to this analysis that the district court, this Court, and the Supreme Court have already rejected. Many of their objections reflect simple differences of opinion with the district court—but do not even approach the standard required to surmount clear error review. *Brnovich*, 141 S. Ct. at 2349; *Env't Tex. Citizen Lobby,* 968 F.3d at 367.

First (at 12-14) Appellants contend that there is "no record evidence demonstrating that terminating MPP in fact led to an increase in the number of noncitizens released" and that "an increase in [border] encounters cannot be traced to MPP."

These contentions simply ignore the Administrative Record—and Appellants' own previous assessment of MPP (to say nothing of the district court's findings of fact). In October 2019, DHS published a document titled "Assessment of the Migrant Protection Protocols (MPP)." ROA.2707-12. That assessment describes MPP as "a cornerstone of DHS's ongoing efforts to restore integrity to the immigration system." ROA.2711. It further describes MPP as a "tool[] that DHS has employed effectively to reduce incentives for aliens to assert claims for relief or protection, many of which may be meritless, as a means to enter the United States to live and work during the pendency of multi-year immigration proceedings." ROA.2711.

MPP had been "an indispensable tool in addressing the ongoing crisis at the southern border and restoring integrity to the immigration system," ROA.2708. And "DHS . . . observed a connection between MPP implementation and decreasing enforcement actions at the border—including a rapid and substantial decline in apprehensions in those areas where the most amenable aliens have been processed and returned to Mexico pursuant to MPP." ROA.2708. This record evidence establishes that MPP had exactly the effects that Appellants claim it did not—and is by itself more than sufficient to affirm the district court's factual findings on clear error review.

The district court cited this analysis at length, *see Texas*, 2021 WL 3603341, at *5-6, but Appellants simply ignore it. Appellants likewise ignore that they conceded

at trial—again as the district court pointed out—that "it's fair to say that [MPP] probably deterred some individuals from coming to the United States." ROA.3210. When combined with the massive surge of enforcement encounters at the southern border that is undisputed—and that the district court again detailed at length, *Texas*, 2021 WL 3603341, at *8-9—the district court's conclusion that termination of MPP has contributed to that surge is amply supported by the record.

Second (at 15-17), Appellants suggest that the harms to the State are speculative—because they erroneously believe that it is conjectural that individuals who would have been subject to MPP would settle in the States. Appellants are wrong. The district court concluded that "[b]y December 31, 2020, DHS had enrolled 68,039 aliens in the MPP program." *Id.* at *5. The States need not demonstrate with mathematical precision how many aliens who would have been subject to MPP will seek a driver's license, make use of medical care, attend public school,[4] or commit a crime in either Texas or Missouri. *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 983 (2017) ("For standing purposes, a loss of even a small amount of money is ordinarily an injury.") (internal quotation marks omitted); *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 801-02 (2021).[5] That this will occur in Texas, which shares over 1,200

[4] As Appellants' own assessment of MPP recognized, "Central American families—who were the main driver of the crisis and comprise a majority of MPP-amenable aliens—ha[d] decreased by approximately 80%" after implementation of MPP. *Id.* (footnote omitted).

[5] Appellants' assertion (at 16) that the States must demonstrate standing through costs of "several million dollars" or (at 17) by demonstrating that they

miles of common border with Mexico, or Missouri, where nearly 6 in 100 aliens who remain unlawfully in the United States reside, is indeed the "predictable effect" of terminating MPP. *Texas*, 2021 WL 3603341, at *9, *11.[6]

Third, (at 18-19) Appellants take issue with the district court's conclusion that the States are entitled to special solicitude because they raise an arbitrary and capricious rather than a notice-and-comment procedures claim. But, as noted above, that is inconsistent with the Supreme Court's decision in *Massachusetts v. EPA*, where Massachusetts had a procedural right under the Clean Air Act "to challenge the rejection of its rulemaking petition as arbitrary and capricious." 549 U.S. at 520.

Fourth, (at 21) Appellants contend that a state's voluntary decision to adopt and fund a benefit for all residents does not give a state standing to challenge any policy that might increase the State's population. This ignores first that the States do not have discretion to provide a free and public education to students regardless of immigration status, *Plyler*, 457 U.S. at 205, 230, or to deal with crime within its borders. The States cannot be said to have created their own harm by complying with the Supreme Court's precedents. Nor can States simply ignore the effects of increased

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would need to hire "employees, purchase equipment, and obtain office space" cannot be squared with this binding Supreme Court precedent.

[6] *Crane v. Johnson*, 783 F.3d 244, 250 (5th Cir. 2015) is easily distinguishable because there the only evidence the State provided to show standing was "a 2006 report which estimated the annual cost of immigration six years before the DACA program was instituted." The record on which the district court based its extensive findings of fact is much richer here.

crime within their borders. As a result, the States' costs resulting from MPP's rescission are not self-inflicted in any meaningful sense.

In any event, this Court has explained that "treating the availability of changing state law as a bar to standing would deprive states of judicial recourse for many *bona fide* harms." *Texas*, 809 F.3d at 157. In doing so, this Court persuasively distinguished *Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976) (per curiam), the case on which Appellants primarily rely. *Texas*, 809 F.3d at 157-58.

Fifth, (at 22-23) Appellants contend that the alleged injuries are not redressable because at least some groups of aliens may not be subject to MPP, some aliens may not be returned to Mexico, and MPP does not mandate that any individual alien be returned. This analysis simply ignores that over 68,000 aliens were returned to Mexico while MPP was implemented, *Texas*, 2021 WL 3603341, at *5, and that many aliens may be obliged to remain in Mexico simply by "simply refus[ing] admission at ports of entry in the first place." *Texas*, 10 F.4th at 548. The district court's judgment need not redress every conceivable harm in order to satisfy Article III. *Uzuegbunam*, 141 S. Ct. 802 (even nominal damages "satisfies the redressability element of standing").

II. The District Court Correctly Determined That the Decision to Terminate MPP Is Subject to Judicial Review.

Both the district court and this Court have already concluded that the rescission of MPP is subject to judicial review. The district court's analysis should be affirmed.

A. Rescission of MPP is not committed to agency discretion by law.

The district court correctly concluded that rescission of MPP is not committed to agency discretion by law. *Texas*, 2021 WL 3603341, at *16. "Establishing unreviewability is a 'heavy burden' and 'where substantial doubt about congressional intent exists, the general presumption favoring judicial review of administrative action is controlling.'" *Texas*, 809 F.3d at 164 (quoting *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 351 (1984)).

The APA contains a "basic presumption of judicial review." *Regents*, 140 S. Ct. at 1905. "To honor the presumption of review," the Supreme Court has read section 701(a)(2) "quite narrowly, confining it to those rare administrative decisions traditionally left to agency discretion." *Id.* (cleaned up). These limited categories include: (1) a "decision not to institute enforcement proceedings," *id.* (citing *Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985)); (2) "a decision not to reconsider a final action," *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 370 (2018) (citing *ICC v. Brotherhood of Locomotive Eng'rs*, 482 U.S. 270, 282 (1987)); (3) "a decision . . . to terminate an employee in the interests of national security," *Lincoln v. Vigil*, 508 U.S. 182, 192 (1993) (citing *Webster v. Doe*, 486 U.S. 592, 599-601 (1988)); and (4) "[t]he allocation of funds from a lump-sum appropriation." *Id*. None of those limited categories apply here.

The mere presence of some discretion does not render decisions unreviewable. *E.g.*, *Regents*, 140 S. Ct. at 1905-07. Even if the statute "leave[s] much to the Secretary's discretion," it "do[es] not leave his discretion unbounded." *Dep't of Com.*, 139 S. Ct. at 2568. This is not a "case in which there is no law to apply." *Id.* at 2569

(internal quotation marks omitted). Indeed, this Court has correctly identified numerous statutes that cabin the Secretary's discretion. *Texas*, 10 F.4th at 551. So did the district court. *Texas*, 2021 WL 3603341, at *16-17.

In the norm, as here, agency action can be set aside "if it [is] made without a rational explanation, inexplicably depart[s] from established policies, or rest[s] on an impermissible basis." *Wong Wing Hang v. INS*, 360 F.2d 715, 718 (2d Cir. 1966). As it can when an agency fails to account for reliance interests, or when it fails to consider less-disruptive policies when changing course. *Regents*, 140 S. Ct. at 1913-15.

Rescission of MPP was not an exercise of prosecutorial discretion, as Appellants (at 24-25) contend. As this Court recognized, "termination of MPP was simply not a non-enforcement decision" because "MPP was a government program—replete with rules[,] procedures[,] and dedicated infrastructure." *Texas*, 10 F.4th at 552. That is because "the termination of MPP will necessarily lead to the release and parole of aliens into the United States[,]" many or all of whom will "receive benefits such as work authorization." *Id.* at 551. "[R]eviewable agency action . . . need not directly confer public benefits—removing a categorical bar on receipt of those benefits and thereby making a class of persons newly eligible for them 'provides a focus for judicial review.'" *Texas*, 809 F.3d at 167 (quoting *Chaney*, 470 U.S. at 832).[7]

[7] Appellants (at 23) mention 8 U.S.C. § 1252(a)(2)(B)(ii) in passing, suggesting that it independently precludes judicial review. At least four courts have rejected the argument. *Texas*, 2021 WL 3603341, at *15. In any event, the States challenge the Secretary's rescission of MPP under the APA, not the "[d]enial[] of discretionary relief" in an individual case. 8 U.S.C. § 1252(a)(2)(B)(ii). Section 1252(a)(2)(B)(ii) prevents aliens from challenging the federal government's refusal to grant

B. The States are in the INA's zone of interest.

The district court correctly concluded that the States are in the zone of interest of the INA. *Texas*, 2021 WL 3603341, at *17. The "test is not meant to be especially demanding and is applied in keeping with Congress's evident intent when enacting the APA to make agency action presumptively reviewable." *Texas*, 809 F.3d at 162 (cleaned up). "The Supreme Court has always conspicuously included the word 'arguably' in the test to indicate that the benefit of any doubt goes to the plaintiff, and [this Court] does not require any indication of congressional purpose to benefit the would-be plaintiff." *Id.* (cleaned up). "The test forecloses suit only when a plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Id.* (internal quotation marks omitted).

The States satisfy this standard. As this Court has explained, "'[t]he pervasiveness of federal regulation does not diminish the importance of immigration policy to the States,' which 'bear[] many of the consequences of unlawful immigration.'" *Id.* at 163 (quoting *Arizona v. United States*, 567 U.S. 387, 397 (2012)).

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discretionary relief "as a matter of grace." *Kucana v. Holder*, 558 U.S. 233, 247-48 (2010). It does not apply when a plaintiff "challenge[s] the extent of the [official's] authority" because "authority is not a matter of discretion." *Zadvydas v. Davis*, 533 U.S. 678, 688 (2001). Merely labeling a federal official's decision "discretionary" does not "trigger[] § (a)(2)(B)(ii)'s discretionary review bar." *Arbid v. Holder*, 700 F.3d 379, 384 (9th Cir. 2012) (per curiam).

Appellants' contentions to the contrary fail. First, (at 27), Appellants contend that the relevant inquiry is Section 1225(b)(2)(C) rather than the INA. But that does not accord with this Court's precedent. *See id.* ("The interests the states seek to protect fall within the zone of interests of the INA."). Nor does it accord with Supreme Court precedent. *See Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 401 (1987). Second (at 27-28), Appellants contend that the impact on the States is speculative and attenuated. But that argument is simply derivative of their erroneous standing arguments. Because the States suffer real pocketbook injury from termination of MPP, that argument fails. *Supra*, 13-15.

C. Rescission of MPP was final agency action.

The APA allows judicial review for "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. The district court correctly determined that rescission of MPP was final agency action. *Texas*, 2021 WL 3603341, at *13-14.

In order to be final, agency action first "must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature." *Hawkes*, 136 S. Ct. at 1813 (quoting *Bennett*, 520 U.S. at 177-78. "[S]econd, the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Bennett*, 520 U.S. at 178 (quoting *Port of Boston Marine Terminal Assn. v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970)). "The Supreme Court has long taken a pragmatic approach to finality, viewing the APA's finality requirement as flexible." *Texas*, 933 F.3d at 441 (cleaned up).

The district court explained that the "parties do not contest that the June 1 Memorandum marks the consummation of the decisionmaking process" and that "the June 1 Memorandum produces legal consequences and determines rights and obligations" by "terminating the MPP program" and "prevent[ing] DHS line officers from using MPP, a tool that was previously available to them." *Texas*, 2021 WL 3603341, at *13-14. This Court agreed, holding that "[a]s the district court ably explained, the Memorandum withdrew DHS officers' previously existing discretion when it directed 'DHS personnel, effective immediately, to take all appropriate actions to terminate MPP, including taking all steps necessary to rescind implementing guidance and other directives to carry out MPP.'" *Texas*, 10 F.4th at 550 (quoting *Texas*, 2021 WL 3603341, at *14). That is all that is required.

Appellants (at 29-30) reiterate their argument that the rescission of MPP was nothing more than a statement of policy. This Court is "mindful but suspicious of the agency's own characterization" and focuses "primarily on whether the rule has binding effect on agency discretion or severely restricts it." *Texas*, 809 F.3d at 171 & n.125 (quoting *Pros. & Patients for Customized Care v. Shalala*, 56 F.3d 592, 595 (5th Cir. 1995) (footnote omitted)). "The primary distinction . . . turns on whether an agency intends to bind *itself* to a particular legal position." *Texas*, 933 F.3d at 441 (footnote and internal quotation marks omitted). And "whether an action binds the agency is evident if it either appears on its face to be binding[] or is applied by the agency in a way that indicates it is binding." *Id.* (internal quotation marks omitted).

The rescission of MPP easily meets this standard. Where, as here "agency action withdraws an entity's previously-held discretion, that action alters the legal

regime, binds the entity, and thus qualifies as final agency action' under the APA." *Texas*, 10 F.4th at 550 (quoting *Texas*, 933 F.3d at 442). After MPP's recission, DHS line officers cannot employ MPP, a tool that was previously available to them.

Insofar as more is necessary, the district court and this Court both recognized that "MPP was a government program—replete with rules[,] procedures[,] and dedicated infrastructure." *Id.* at 552. And it is "precisely because MPP was a government program . . . that the Government now claims that it will be difficult to resume." *Id.* Thus, it bears little resemblance to a policy statement that "simply lets the public know [DHS's] current enforcement or adjudicatory approach." *Sycor Int'l Corp. v. Shalala*, 127 F.3d 90, 94 (D.C. Cir. 1997).

III. The District Court Correctly Determined That the Decision to Terminate MPP Was Arbitrary and Capricious.

The district court, this Court, and the Supreme Court have all determined that the rescission of MPP was arbitrary and capricious. *Texas*, 2021 WL 3603341, at *18-23; Texas, 10 F. 4th at 552-57; *Biden*, No. 21A21, 2021 WL 3732667, at *1.

"The APA's arbitrary-and-capricious standard requires that agency action be reasonable and reasonably explained," *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021), which implies a host of procedural obligations. Courts must ensure "the agency has acted within a zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision." *Id.* "[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins.*

Co., 463 U.S. 29, 43 (1983). It must consider the reliance interests of those affected by the regulation, *Regents*, 140 S. Ct. at 1913-15, and must consider less-disruptive policies in the light of those interests. *Id.* The agency may not offer pretextual or *post hoc* explanations of its actions. *SEC v. Chenery Corp.*, 332 U.S. 194, 196-97 (1947).

A. The June 1 Memorandum both failed to consider important aspects of the problem and reached arbitrary conclusions.

1. The June 1 Memorandum failed to consider MPP's benefits.

In October 2019, DHS itself concluded that asylum applicants "with non-meritorious claims often remain in the country for lengthy periods of time," creating "perverse incentives." ROA.2712. After implementing MPP, DHS determined "aliens without meritorious claims—which no longer constitute[d] a free ticket into the United States—[were] beginning to voluntarily return home." ROA.2709. The district court made findings of fact—reviewable only for clear error—on these issues. *Texas*, 2021 WL 3603341, at *5-6, *18. And as the district court concluded, "[t]he June 1 Memorandum never once mentions these benefits." *Id.* at 18. It also explained that these benefits were a "cornerstone" of DHS's prior immigration policy. *Id.* at *5.

As this Court further explained, the Secretary did not mention, let alone meaningfully discuss these findings. *Texas*, 10 F.4th at 554. This fails to comply with the APA. When an agency's "new policy rests upon factual findings that contradict those which underlay its prior policy" it must "provide a more detailed justification than what would suffice for a new policy created on a blank slate." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). "In such cases it is not that further

justification is demanded by the mere fact of policy change[,] but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Id.* at 515-16. "It would be arbitrary or capricious to ignore such matters." *Id.* at 515.

Appellants contend (at 43) that the June 1 Memorandum is sufficient because it states that the Secretary evaluated all "prior DHS assessments of the program" and the Secretary exercised his judgment to address the problems using "different policy tools." But even assuming (contrary to what the district court and this Court have held) that the June 1 Memorandum does suggest that other policy options might better address the problem, that conclusion does not relieve the Secretary of the obligation to provide "a reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by the prior policy." *FCC*, 556 U.S. at 516. The June 1 Memorandum does not expressly mention, let alone discuss, the benefits of the prior policy.

Even further assuming that the June 1 Memorandum does vaguely reflect consideration of the benefits of MPP, it is not enough to simply state *ipse dixit* that an agency considered an issue. *Getty v. Fed. Sav. & Loan Ins. Corp.*, 805 F.2d 1050, 1055 (D.C. Cir. 1986); *see also Gresham v. Azar*, 950 F.3d 93, 103 (D.C. Cir. 2020); *United Techs. Corp. v. U.S. Dep't of Def.*, 601 F.3d 557, 562 (D.C. Cir. 2010); *Gerber v. Norton*, 294 F.3d 173, 185 (D.C. Cir. 2002). DHS may not simply say that it considered the issue—but must actually do so.

2. The June 1 Memorandum reached arbitrary conclusions.

The June 1 Memorandum arbitrarily relied on the alleged "high percentage of cases completed through the entry of *in absentia* removal orders" associated with MPP—specifically 44%. *Texas*, 2021 WL 3603341, at *20-21. The June 1 Memorandum explains only that this "raises questions . . . about the design and operation of the program." *Id.* at *8. The district court noted two defects in this analysis. *First*, the district court concluded that this analysis reaches no policy conclusion at all. *Id.* at *20 (quoting *State Farm*, 463 U.S. at 52). *Second*, the district court concluded that DHS's own data suggest comparable *in absentia* removal rates before MPP's implementation. *Id.* at *21. Thus, the June 1 Memorandum did not conclude that 44% was a high rate of *in absentia* removal, whether MPP was the cause, and if so whether that meant the MPP performed as intended. *Id.* at *20-21.

To be sure, the Secretary was not required to perform an in-depth empirical analysis. Nonetheless, the agency must "examine the relevant data and articulate a satisfactory explanation for its actions including a rational connection between the facts found and the choice made." *State Farm*, 463 U.S. at 43 (internal quotation marks omitted). And the agency must address the statistics that are in the record. *See Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (holding "an unexplained inconsistency in agency policy is a reason for holding an interpretation to be an arbitrary and capricious change from agency practice") (cleaned up). By failing to explain whether a 44% *in absentia* removal rate was high, how it compared to *in absentia* removal rates outside the MPP, or whether a 44% removal rate meant that

the program was working effectively, the June 1 Memorandum was arbitrary and capricious.

This was not the only arbitrary conclusion the June 1 Memorandum reached. The June 1 Memorandum's reliance on the COVID-19 pandemic was arbitrary because "immigration courts were reopened by the end of April 2021" and it arbitrarily relied on "*past* problems with *past* closures." *Texas*, 2021 WL 3603341, at *21. Appellants contend (at 50 n.12) that the infrastructure remains shuttered. But they still have not provided any "indication that the facilities are . . . shuttered because of the pandemic—as opposed to the choice the Government itself made when it suspended MPP." *Texas*, 10 F.4th at 557.

3. The June 1 Memorandum failed to consider the States' reliance interests.

As both the district court, *Texas*, 2021 WL 3603341, at *19-20, and this Court, *Texas*, 10 F.4th at 553-54, concluded, the June 1 Memorandum was arbitrary and capricious for failing to consider the States' reliance interests. Supreme Court precedent requires the consideration of such interests.

The Supreme Court's opinion in *Regents* required DHS to consider reliance interests, including States' reliance interests. 140 S. Ct. at 1914. The Deferred Action for Childhood Arrivals program was a discretionary program, like MPP. *Id.* at 1910-12. But the Supreme Court nonetheless explained that "[w]hen an agency changes course, . . . it must be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account." *Id.* at 1913 (internal quotation marks omitted). And the Supreme Court described contentions by States and

local governments that they "could lose $1.25 billion in tax revenue each year" as "not necessarily dispositive" but "certainly noteworthy concerns." *Id.* at 1914. "[B]ecause DHS was not writing on a blank slate, it *was* required to assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns." *Id.* at 1915 (citation and internal quotation marks omitted). Here, DHS simply did not consider the States' reliance interests, rendering the June 1 Memorandum arbitrary and capricious.

Appellants urge (at 45-46) that there is no evidence of fiscal harms to the States. But that is simply a recitation of their argument that the States lack standing. That argument is wrong. *Supra*, 13-15.[8]

Appellants next contend (at 46-52) that the States have no reliance interest in MPP and disagree with the district court (and this Court's) reading of the Supreme Court's opinion in *Regents*. But the Supreme Court, in denying Appellants' request for a stay cited that opinion, and specifically pointed to the portion of the analysis addressing the importance of reliance interests in doing so. *Biden*, 2021 WL 3732667, at *1 ("The applicants have failed to show a likelihood of success on the claim that the memorandum rescinding the Migrant Protection Protocols was not arbitrary and capricious. *See Department of Homeland Security v. Regents of Univ. of Cal.*, 591 U. S.

[8] The Supreme Court concluded at the stay stage that Appellants had "failed to show a likelihood of success on the" arbitrary-and-capricious claim, over Appellants' procedural objections on standing and reviewability. *Biden*, 2021 WL 3732667, at *1 (citing *Regents,* 140 S. Ct. 1891, 1907, 1910-1915).

____ (2020) (slip op., at 12, 17–26).”). Whatever Appellants think about the *Regents* decision, the Supreme Court evidently disagrees.

Appellants assert (at 47) that “[t]he Secretary’s decision cannot be arbitrary and capricious for failing to imagine and fully consider potential reliance interests the States never articulate.” But the States clearly asserted their reliance interests in this case when filing their complaint—including “the costs of ending the MPP to the States,” and the “prior administration’s method of using the MPP as an indispensable tool in bilateral efforts to address the migration crisis by diminishing incentives for illegal immigration, weakening cartels and human smugglers, and enabling DHS to better focus its resources on legitimate asylum claims.” ROA.53. That Appellants now claim to have been ignorant of these interests may show that it should have consulted the States before terminating MPP, but it does not relieve them of their obligation to adequately consider the States’ reliance interests. And they could not have been ignorant of these interests in any event; the States filed suit well before the June 1 Memorandum was issued. *Texas*, 2021 WL 3603341, at *24.

4. The June 1 Memorandum failed to consider alternatives within the ambit of MPP.

The district court correctly held that the June 1 Memorandum is also arbitrary and capricious for failing to address alternatives to terminating the MPP. *Texas*, 2021 WL 3603341, at *19. “When an agency rescinds a prior policy, its reasoned analysis must consider the alternatives that are within the ambit of the existing policy.” *Regents*, 140 S. Ct. at 1913 (cleaned up). The June 1 Memorandum addressed modifications to the MPP in only one conclusory sentence: “I also considered whether the

program could be modified in some fashion, but I believe that addressing the deficiencies identified in my review would require a total redesign that would involve significant additional investments in personnel and resources." ROA.1688.

While DHS need not have considered "all policy alternatives," *Regents*, 140 S. Ct. at 1914 (quoting *State Farm*, 463 U.S. at 51), it nonetheless was required to "consider the alternatives that [were] within the ambit of the existing policy." *Id.* at 1913 (cleaned up). It did not. Merely stating that these alternatives were considered was not enough. *Texas*, 10 F.4th at 556 (collecting cases). In any event, as this Court has already recognized, the alternative policies that DHS claims it considered are outside the ambit of MPP. *Id.* at 555.

5. The June 1 Memorandum failed to consider the effect of MPP's rescission on DHS's compliance with Section 1225.

Finally, the district court also concluded that the June 1 Memorandum was arbitrary and capricious because it failed to consider the rescission of MPP's impact on DHS's obligations to detain certain aliens under Section 1225. *Texas*, 2021 WL 3603341, at *21-22. As discussed in more detail, *infra*, that conclusion was also correct.

B. The district court correctly determined that remand with vacatur was the appropriate remedy.

Appellants contend (at 51-52), that remand without vacatur was the appropriate remedy because the Secretary may be able to better substantiate his decision and vacatur is disruptive. The district court concluded that "as a textual matter, the mandatory language of the APA has led courts to make remand and vacatur the default

remedy for agency Action that violates the APA." *Texas*, 2021 WL 3603341, at *23 (citing *United Steel v. Mine Safety and Health Admin.*, 925 F.3d 1279, 1287 (D.C. Cir. 2019)). It found that "the deficiencies in the June 1 Memorandum are serious and are unlikely to be resolved on simple remand." *Id.*

As explained above—and consistent with every court that has reviewed the June 1 Memorandum concluding it is arbitrary and capricious—that conclusion is correct. Moreover, as this Court explained, *Texas*, 10 F.4th at 560, in *Regents* the Supreme Court specifically concluded that a supplemental memorandum "issued nine months after the rescission [of DACA] impermissibly assert[ed] prudential and policy reasons not relied upon" by the relevant decisionmaker. *Regents*, 140 S. Ct. at 1907. There is no reason to believe, in view of the many flaws in the June 1 Memorandum, that the same would not be true here.

Second, vacatur is not disruptive. The district court required Appellants to reimplement MPP "in good faith." *Texas*, 2021 WL 3603341, at *27; *see also Texas*, 10 F.4th at 557-58. Appellants are not disrupted by being required to reimplement MPP in good faith as they might have been if required to do so overnight.

Finally, DHS has already announced its intention to promulgate a new memorandum terminating MPP. *See* DHS Announces Intention to Issue New Memo Terminating MPP (September 29, 2021), https://www.dhs.gov/news/2021/09/29/dhs-announces-intention-issue-new-memo-terminating-mpp, (last accessed October 12, 2021). Insofar as Appellants had a choice between resting on the June 1 Memorandum with supplementary reasoning or issuing a new memorandum, *Regents*, 140 S. Ct. at 1908, they have already made that choice themselves.

IV. The District Court Correctly Concluded That Termination of MPP Led Appellants to Violate Systematically Section 1225.

The district concluded that "Section 1225 provides the government two options vis-à-vis aliens seeking asylum: (1) mandatory detention; or (2) return to a contiguous territory." *Texas*, 2021 WL 3603341, at *22. "Failing to detain or return aliens pending their immigration proceedings violates Section 1225." *Id.* "Under *these particular* circumstances, where Defendants cannot meet their detention obligations, terminating MPP necessarily leads to the systemic violation of Section 1225." *Id.* at *23. Put simply, "aliens are released into the United States because Defendants are unable to detain them." *Id.* The district court explicitly relied on the administrative record when making this factual determination. *Texas*, 2021 WL 3603341, at *22-23 & n.11.

The district court was not blind to other alternatives. It acknowledged that parole is an alternative, "only on a case-by-case basis for urgent humanitarian reasons or significant public benefit." *Id.* (quoting 8 U.S.C. § 1182(d)(5)(A)). The federal government may also, as the district court recognized, release certain aliens on "bond" or "conditional parole." 8 U.S.C. § 1226(a)(2).

A. Federal Law requires detention of aliens covered by Section 1225 with limited exceptions.

The district court was correct to conclude that, in general, the statutory scheme requires detention. If an alien subject to expedited removal lacks credible fear of persecution, the alien can invoke further administrative proceedings but "shall be detained pending a final determination of credible fear of persecution and, if found not to have such a fear, until removed." *Id.* § 1225(b)(1)(B)(iii)(IV). Even if the officer

determines that the "alien has a credible fear of persecution . . . the alien shall be detained for further consideration of the application for asylum." *Id.* § 1225(b)(1)(B)(ii).

For aliens not going through expedited removal (that is, aliens given a Notice to Appear), the INA typically mandates detention: "if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for" removal proceedings. *Id.* § 1225(b)(2)(A). The INA *does* give the federal government an alternative choice if the alien "is arriving on land . . . from a foreign territory contiguous to the United States"—namely, the government "may return the alien to that territory pending" asylum proceedings. *Id.* § 1225(b)(2)(C).

These uses of the word "shall" indicate mandatory action. "The first sign that the statute impose[s] an obligation is its mandatory language: 'shall.'" *Maine Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1320 (2020). "Unlike the word 'may,' which implies discretion, the word 'shall' usually connotes a requirement." *Id.* (quoting *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1977 (2016)). The mandatory nature of the "shall" provisions of Section 1225 are "underscore[d]" by "adjacent provisions." *Id.* at 1321. "'When', as is the case here, Congress 'distinguishes between "may" and "shall," it is generally clear that "shall" imposes a mandatory duty.'" *Id.* (quoting *Kingdomware*, 136 S. Ct. at 1977). The INA generally—and Section 1225 specifically—employs both "may" and "shall" demonstrating that Congress distinguished between duties that the executive must undertake and duties that the executive has discretion whether to undertake.

That said, the States do not, and have never, contended that this scheme mandates MPP. The second option—under Section 1225(b)(2)(C))—is *optional*. *See* 8 U.S.C. § 1225(b)(2)(C) (providing that the federal government "may return the alien to that territory"). The federal government can always choose the first option: detention. And the States recognize that DHS may grant parole on a case-by-case basis for urgent humanitarian reasons or release certain aliens on bond or conditional parole.

But "[w]hat the Government cannot do, the district court held, is simply release every alien described in § 1225 *en masse* into the United States." *Texas*, 10 F.4th at 558. "The Government has not pointed to a single word anywhere in the INA that suggests it can do that." *Id.* As the district court concluded "[u]nder *these particular* circumstances, where Defendants cannot meet their detention obligations, terminating MPP necessarily leads to the systematic violation of Section 1225 as aliens are released into the United States because Defendants are unable to detain them." *Texas*, 2021 WL 3603341, at *23.

B. Appellants' contrary arguments are without merit.

Appellants' counterarguments to this straightforward matter of statutory interpretation are unpersuasive. First (at 32), Appellants complain that the operative complaint challenges the June 1 Memorandum rather than any DHS policy regarding release from detention or parole. But the operative complaint explains the relationship between termination of MPP and violations of Section 1225 in detail and alleges that "[d]iscontinuing MPP therefore violates 8 U.S.C. § 1225." ROA.1054-55. There is no question whether the issue was properly presented to the district court.

Second (at 31-33), citing *Town of Castle Rock v. Gonzalez*, 545 U.S. 748, 761 (2005), Appellants contend that "shall" is not mandatory in the law enforcement context. But even assuming Appellants read *Castle Rock* correctly—and they do not—aliens subject to Section 1225 are *already in removal proceedings* under Section 1229a. *Texas*, 2021 WL 3603341, at *4-5. So the decision to place a covered alien in removal proceedings has already been made. The only question is whether Appellants will comply with their statutory duties during the pendency of those proceedings.

Next (at 33-36), Appellants contend that the government has options other than detention or return to contiguous territory. But the district court recognized these other options. *Id.* at *22 & n.11. As did this Court previously. *Texas*, 10 F.4th at 558. Appellants aim their fire at a strawman.

Insofar as Appellants contend that simple lack of a desire to detain certain aliens or lack of resources means they necessarily comply with the narrow parole authority contained in Section § 1182(d), that argument strains credulity. Section § 1182(d) authority is limited to parole "on a case-by-case basis for urgent humanitarian reasons or significant public benefit." 8 U.S.C. § 1182(d)(5)(A). Releasing aliens en masse on a classwide basis because of lack of detention resources does not comply with that narrow parole authority.

Finally (at 37-40) Appellants contend that that Section 1252(f)(1) prohibits the district court's injunction. It is true that "Congress stripped all courts, save for the Supreme Court, of jurisdiction to enjoin or restrain the operation of 8 U.S.C. §§ 1221-1232 on a class-wide basis." *Hamama v. Adducci*, 946 F.3d 875, 877 (6th Cir.

2020). But the States do not seek to enjoin operation of those portions of the INA. Quite the opposite: the States seek to require DHS to follow law that it would prefer to ignore. "Congress rarely intends to prevent courts from enforcing its directives to federal agencies. For that reason, [the Supreme] Court applies a 'strong presumption' favoring judicial review of administrative action." *Mach Mining, LLC v. EEOC*, 575 U.S. 480, 486 (2015).

Appellants assert that this reasoning was rejected by two Justices concurring in *Nielsen v. Preap*, 139 S. Ct. 954, 975 (2019) (plurality op.). *First*, the Supreme Court expressly declined to reach this issue in *Preap*. *Id.* at 962. Second, the plaintiffs in *Preap* sought to prevent DHS from enforcing a statute mandating that "[t]he Attorney General shall take into custody" 8 U.S.C. § 1226(c), certain categories of aliens on a classwide basis. 139 S. Ct. at 960.

The States seek the opposite. Rather than challenging the application of mandatory provisions of the INA, the States here challenge the June 1 Memorandum as arbitrary and capricious, and seek enforcement of the INA's mandatory provisions. This is not a challenge to "enjoin or restrain the operation of the provisions of part IV of this subchapter," 8 U.S.C. § 1252(f)(1), but rather a challenge to the June 1 Memorandum in order to vindicate those provisions' enforcement. Insofar as that results in Appellants *complying with* their statutory obligations, the injunction plainly does not "restrain the operation[s]" of the INA. *Id.*

V. The Equitable Factors Support Affirming the Injunction.

Permanent injunctive relief is proper where the plaintiffs show (1) irreparable harm; (2) no adequate remedy at law; (3) the balance of hardships between the

plaintiffs and defendants favors injunctive relief; and (4) the public interest would not be disserved by a permanent injunction. *eBay Inc.*, 547 U.S. at 391. The district concluded that the States satisfied all four of these equitable factors. *See Texas*, 2021 WL 3603341, at *26. The court also (correctly) concluded that a nationwide injunction independent of vacatur of the June 1 Memorandum was warranted under binding Fifth Circuit precedent in immigration-related cases, and to ensure the States received a full remedy. *See id.* at *1, 26-28.

Appellants primarily assert (at 52-56) that the "balance of equities . . . weighs against" upholding the injunction. But they do not effectively dispute the district court's conclusions that the States showed that (1) "they are suffering ongoing and future injuries as a result of the termination of MPP"; (2) they "are unable to recover the additional expenditures from the federal government"; or that (3) there is no public interest "in the perpetuation of unlawful agency action." *Texas*, 2021 WL 3603341, at *26 (cleaned up). But there is such an interest in having federal agencies abide by federal law, in "stemming the flow of illegal immigration," and in enforcing federal immigrations laws such as Section 1225. *Id.* The equitable factors, thus, overwhelmingly favor affirming the injunction.

Appellants are simply incorrect to say that the applicable factors actually weigh against injunctive relief.

First, they argue (at 52) that the injunction interferes with the Executive Branch's discretion under the INA to enforce federal immigration law and, therefore, threatens the separation of powers. Not so. "All the district court's injunction requires of the Government is that it act in accordance with the INA." *Texas*, 10

F.4th at 560. Indeed, the idea of judicial review is premised on the notion that requiring the Executive Branch to comply with the law does not offend the separation of powers. Thus, "[t]he Government is . . . wrong to say that" vacating the injunction "would promote the public interest by preserving the separation of powers." *Id.*

Where, as here, the federal government is refusing to perform its obligations under federal laws duly enacted by Congress, equitable relief is proper. *See Texas v. United States*, 787 F.3d 733, 769 (5th Cir. 2015).[9] That is because "[t]here is always a public interest in prompt" enforcement of the immigration laws. *Nken*, 556 U.S. at 436. Here, Appellants are violating, not enforcing, federal immigration law. *See, e.g.*, *Texas*, 2021 WL 3603341, at *21-23. Because there is no public interest in abdicating statutory obligations, *see Texas*, 787 F.3d at 768, the balance of the equities favors affirming the district court's equitable relief here.

Second, Appellants claim (at 53) that they cannot restart MPP without securing cooperation from the Government of Mexico. But "MPP was adopted and launched unilaterally, just as it was later terminated unilaterally." *Texas*, 2021 WL 3603341, at *25 n.15; *Texas*, 10 F.4th at 559. The United States only obtained Mexico's agreement to cooperate in accepting MPP enrollees back into Mexico after the fact. *Texas*, 10 F.4th at 543. Appellants do not maintain that Mexico has ever withdrawn that consent. *Id.* at 548-49, 559. "And even if Mexico's cooperation may be required to return an alien who has already been admitted, nothing prevents DHS from refusing

[9] This is not a case where a federal court has precluded the Executive Branch from *enforcing* the nation's immigration laws. *See, e.g.*, *Wolf v. Innovation L. Lab*, 140 S. Ct. 1564 (2020); *Innovation L. Lab v. McAleenan*, 924 F.3d 503, 510 (9th Cir. 2019).

to admit asylum applicants at ports of entry in the first place—before they ever enter the United States." *Texas*, 2021 WL 3603341, at *25 n.15; *see also Texas*, 10 F.4th at 548. Thus, the simplest course for this Court is to defer to the district court's uncontested factual findings: "The United States initiated MPP unilaterally," and "nothing prevents DHS from refusing to admit asylum applicants at ports of entry" without "Mexico's cooperation." *Texas*, 2021 WL 3603341, at *25 n.15.

Citing declarations of David Shahoulian and Ricardo Zúniga that were first submitted at the *stay* stage—after the district court's final judgment following a bench trial—Appellants further argue (at 53) that the injunction supposedly dictates the United States' foreign policy. This argument has no merit.

First, whatever the merit of Appellants' evidence submitted post-judgment, the evidence they submitted *at trial* failed to substantiate these allegations. Mr. Shahoulian's earlier declaration submitted at trial, ROA.2445-54, provided no concrete evidence of diplomatic interference from restoring MPP, but instead spoke vaguely of "a close, delicate, and dynamic conversation" on immigration issues, ROA.2445; an ill-defined need "to react and adjust their policy and operational responses as necessary," ROA.2446; and a vague desire to "work together to look for more robust regional solutions to manage migration." ROA.2252. And it alluded to "delicate bilateral (and multilateral) discussions and negotiations," ROA.2252-53. Likewise, the State Department's declaration submitted at trial, ROA.2455-63, relied on vague invocations of "long-term strategic partnerships," ROA.2456-57; "focus[ing] energy and resources on collective action," ROA.2457-58; "address[ing] root causes" of

issues at the border, ROA.2460; and improving "bilateral relationships" with countries south of the border, ROA.2459.

But other than stating that Mexico approved the shut-down of a migrant camp in Mexico where migrants faced violence and sexual abuse, ROA.2460—which is an allegation that supports *the States'* claims here—neither declaration alleged that Mexico opposed the initiation of MPP, refused to cooperate in its implementation, or lobbied for its termination. Indeed, notably absent from DHS's trial evidence was any specific allegation that Mexico requested the termination of MPP at any point, that Mexico would be unwilling to cooperate in re-implementing MPP, or that MPP would somehow disrupt other diplomatic efforts to address illegal immigration.

To the extent it addressed the question at all, DHS's trial evidence (correctly) portrayed Mexico as a willing participant in MPP and conceded that the cancellation of MPP was a unilateral decision of the Biden Administration. DHS admitted that, "[s]hortly after the DHS announcement" of MPP, Mexico promptly "committed to a number of steps that were important to the functioning of MPP." ROA.2447-48. DHS conceded that "[a]fter MPP was initiated, the United States and Mexico coordinated closely in response to changing conditions" in implementing MPP. *Id.* DHS's evidence emphasized that the decision to terminate MPP came from President Biden and DHS alone, not from the Mexican government. ROA.2449-50. Appellants cite no trial evidence to challenge any of the district court's factual findings on these points as clearly erroneous—because none exists.

The stay-stage declarations of Mr. Shahoulian and Mr. Zúniga, which Appellants did not present at trial, fare no better. The August 16 declaration of Mr.

Shahoulian addresses the diplomatic relationship with Mexico only to argue that MPP's "entire infrastructure" cannot be reestablished "within seven days." ROA.2991. As this Court held, that argument is a "strawman." *Texas*, 10 F.4th at 557-58. Other than that, Mr. Shahoulian merely speculates that re-implementing MPP "*may* complicate foreign relations with Mexico now and in the future." ROA.2993 (emphasis added). This speculative statement does not support Appellants' predictions (at 53-54) of imminent diplomatic chaos.

Likewise, Mr. Zúniga's post-judgment declaration discusses at length the Administration's efforts to address so-called "irregular migration" through other policies, ROA.3008-14, but it never explains how reimplementing MPP would interfere with any of those other diplomatic efforts. Similarly, Mr. Zúniga correctly portrays Mexico as a willing partner in implementing MPP. *See* ROA.3013-14. Other than these statements, Mr. Zúniga merely argues that implementing MPP "immediate[ly]" and "hastily," without "appropriate humanitarian safeguards," would "negatively impact U.S.-Mexico bilateral relations." ROA.3014-16. But the district court did not require DHS to re-implement MPP "hastily" or recklessly, but to do so "in good faith." *Texas*, 2021 WL 3603341, at *27.

Moreover, Appellants' invocation of vague concerns of potential inference with foreign relations to avoid complying with the APA and the INA proves too much. As Appellants themselves argue, implementing virtually any significant immigration policy may have collateral consequences for foreign relations. But the Government may not use such foreign-policy implications as a blank check to avoid complying with the law—including the APA and the INA. *See Massachusetts*, 549 U.S. at 534;

see also 5 U.S.C. § 553(a)(1) (APA foreign affairs exemption applies to "Rulemaking").

Appellants argue (at 54) that the district court's injunction forces them to re-implement MPP "quickly[.]" Again, as this Court explained, "[t]his is a strawman." *Texas*, 10 F.4th at 557.

Likewise, Appellants' argument (at 53) that an abrupt restart to MPP would "wreak havoc" at the border is a "strawman." *Texas*, 10 F.4th at 557-58. Implementing MPP "in good faith" does not require DHS to create chaos at the border. And based on the unprecedented border crisis that has unfolded in seven months since DHS suspended MPP, the Appellants' argument that re-implementing MPP will cause chaos rings hollow. The humanitarian emergency at the border is occurring now, and it has continued to escalate since MPP's suspension in January; DHS determined in 2019, and the district court found, that MPP provides an "indispensable tool" to alleviate this humanitarian crisis. *Texas*, 2021 WL 3603341, at *5.

Appellants finally argue (at 53-55) that the district court's injunction will be disruptive. Both the district court and the motions panel have already soundly rejected similar claims. The district court found—and the motions panel agreed—that such "problems are entirely self-inflicted[,]" *Texas*, 2021 WL 3603341, at *24, "and therefore do not count." *Texas*, 10 F.4th at 558. This Court too should give no weight to Appellants' assertion of "self-inflicted" injuries. *Pennsylvania*, 426 U.S. at 667.

Even if the injunction imposes some harm on Appellants, such harm was entirely avoidable. *See Texas*, 10 F.4th at 558-59; *see also S.F. Real Est. Invs. v. Real Est. Inv. Tr. of Am.*, 692 F.2d 814, 818 (1st Cir. 1982) (Breyer, J.). Appellants "could have

avoided" these problems "by delaying preparatory work until the litigation was resolved." *Texas*, 2021 WL 3603341, at *24 (quoting *Texas*, 809 F.3d at 187). Or they "could have avoided" any disruptions "by simply informing Mexico that termination of MPP would be subject to judicial review 'until the litigation was resolved.'" *Id.* "Mexico is capable of understanding that DHS is required to follow the laws of the United States which include the APA and INA." *Id.*

Finally, insofar as Appellants claim disruption because MPP they had been in the process of terminating MPP since January, that establishes only that the June 1 Memorandum was a "*post hoc*" rationalization "for a decision that was already made," *id.* at *25, which does not reflect good faith (and would itself be arbitrary and capricious under the APA). *See Texas*, 10 F.4th at 558-60.[10]

CONCLUSION

This Court should affirm the judgment of the district court.

[10] In the district court, Appellants admitted that they began terminating and winding down MPP long before DHS announced its termination on June 1, 2021. *See* ROA.2534; ROA.2536-37; *see also* ROA.2461-62.

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